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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

RENE ALFREDO AMAYA,

Defendant and Appellant.

2d Crim. No. B170421
(Super. Ct. No. PA044663)
(Los Angeles County)

Rene A. Amaya appeals from the judgment entered after a jury convicted him of two counts of criminal threats (Pen. Code,¹ § 422), threatening a witness (§ 140, subd. (a)), and assault with a deadly weapon (§ 245, subd. (a)(1)). The jury also found true allegations that Amaya used a deadly weapon in committing one of the criminal threats (§ 12022, subd. (b)(1)), and that he had suffered two prior felony convictions (§ 1203, subd. (e)(4)). He was sentenced to a five-year prison term. He contends (1) the admission of testimony regarding his uncharged "bad acts" was prejudicial and violated his right to a fair trial, and (2) the trial court exceeded its jurisdiction and violated his right to due process by imposing a "no contact" order. We affirm.

¹ All statutory references are to the Penal Code, unless otherwise noted.

FACTS AND PROCEDURAL HISTORY

On June 14, 2003, Noe Ayala and his wife Imelda witnessed Amaya attack an individual identified as "El Cholo" with a knife. After the attack, the victim drove away in his car. When Amaya saw Noe watching him from his apartment window, he waved his knife in Noe's direction and yelled at him to come down to the carport where Amaya was located. Amaya told Noe, "he didn't care that [Noe] knew karate, [and] that he could kill [him] with a shot." Imelda heard Amaya say "[h]e was in jail a couple times now and nothing scared him at all. He was going to come out some day and [they] were going to pay for it." Amaya's threats put Noe in fear for his life and for his family's safety.

Noe and Imelda called 911, and the police arrived approximately 15 minutes later to find Amaya lying on the ground in the carport. Amaya, who smelled of alcohol and appeared intoxicated, shouted up to Noe that he was a "rat." Amaya also said that he was going to "fuck [Noe] over" and that when he got out of prison "things weren't going to go too well for [Noe]." After the police put Amaya into the squad car, he yelled to Noe in Spanish, "[o]nce I get out, you mother fucker."

At the time of Amaya's arrest, the police found a knife that Noe identified as the weapon Amaya had used in the assault.

DISCUSSION

I.

Testimony Regarding Uncharged Bad Acts

At trial, Noe testified that he and his family had moved due to harassment from Amaya's friends. Imelda testified that she feared Amaya because he had threatened another neighbor. The trial court sustained Amaya's objections to this testimony, ordered it stricken from the record, and admonished the jury to disregard it. Amaya's motion for a mistrial based on the stricken testimony was denied. Amaya contends the court erred in denying the motion because the admonition was insufficient to cure the prejudice created when the jury heard of the uncharged "bad acts" attributed to him by Noe and Imelda.

We review the trial court's denial of a mistrial for an abuse of discretion. (*People v. Cox* (2003) 30 Cal.4th 916, 953.) "' . . . "[A] mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.'" [Citations.]" (*Ibid.*)

In determining whether an error can be cured by an admonition or instruction, we assume the jury understands and applies the instructions it is given. (*People v. Coddington* (2000) 23 Cal.4th 529, 631, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; see also *People v. Zack* (1986) 184 Cal.App.3d 409, 416 ["In the absence of evidence to the contrary, the presumption [that the jury adhered to the limiting instructions] will control"].) Here, there is no evidence from which it can be inferred that the jury failed to heed the court's admonition to disregard the stricken testimony. Moreover, the stricken testimony was insignificant in the context of Noe and Imelda's uncontradicted testimony of Amaya's direct threats. (See *People v. Hayes* (1999) 21 Cal.4th 1211, 1264 [no abuse of discretion in denying mistrial motion due to victim's stricken hearsay testimony that the defendant had threatened her life, where the stricken testimony was insignificant in light of other evidence that the defendant had directly threatened the victim].) Accordingly, the trial court did not abuse its discretion in concluding that the admonition was sufficient to cure any prejudice caused by that testimony.

Amaya cites *People v. Gibson* (1976) 56 Cal.App.3d 119, 130, for the proposition that the court could not "unring the bell" merely by admonishing the jury to ignore the stricken testimony. *Gibson* is inapposite. In *Gibson*, evidence of the defendant's prior bad acts was admitted for the limited purpose of determining state of mind (Evid. Code, §1101, subd. (b)), and the jury was admonished not to consider the evidence as indicative of "criminal propensities." (*Gibson*, at p. 127.) In reversing the defendant's conviction, the Court of Appeal reasoned that the jury could not successfully limit its consideration of the evidence to state of mind while ignoring its implication of

criminal propensities. (*Id.*, at p. 130.) Here, the challenged evidence was stricken from the record. Because the jury was admonished to disregard the stricken testimony, and there is nothing to undermine the assumption that the jury followed that admonition, the trial court did not abuse its discretion by denying Amaya's motion for a mistrial.

Moreover, reversal would not be compelled even if the testimony had not been stricken. The evidence of Amaya's guilt of the charged crimes was overwhelming. Noe gave uncontradicted testimony that he saw Amaya assault the victim with a knife, and a knife was found near Amaya when he was arrested. Noe and Imelda both also gave uncontradicted testimony that Amaya had threatened Noe and that those threats had put him in fear for his and his family's safety. Accordingly, Amaya cannot demonstrate a reasonable probability that he would have received a more favorable verdict had the jury not heard the stricken testimony. (See *People v. Alcala* (1992) 4 Cal.4th 742, 772-773 [applying *People v. Watson* (1956) 46 Cal.2d 818, 836, standard of harmless error to erroneous admission of prior bad acts evidence].)

II.

"No Contact" Order

At sentencing, the trial court issued a protective order prohibiting Amaya from contacting Noe, Imelda, and "El Cholo."² Amaya contends the court lacked jurisdiction to issue the order under section 1203.1 because Amaya was sentenced to state prison.

Section 1203.1 grants courts the authority to issue protective orders only as a condition of probation. The order at issue here is governed by section 136.2. Pursuant to that section, any court with jurisdiction over a criminal matter may impose a no contact order where there is good cause to believe that the defendant will harm, intimidate or

² The order provides that Amaya shall have "no contact with Noe Ayala or his spouse or any member of his family, nor any contact with El Cholo, nor are you to permit or encourage any other individual on your behalf to have contact with them."

dissuade a victim or witness.³ Amaya does not dispute there was good cause for the order issued here, nor does he argue that the order otherwise violates his due process rights. Accordingly, the order was proper.

The judgment is affirmed.

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PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.

³ Section 136.2 provides: "Upon a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur, any court with jurisdiction over a criminal matter may issue orders including, but not limited to, the following: [¶] . . . (d) An order that any person described in this section shall have no communication whatsoever with any specified witness or any victim, except through an attorney under any reasonable restrictions that the court may impose."

Meredith C. Taylor, Judge
Superior Court County of Los Angeles

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